Ace Masonry, Inc., d/b/a Ace Unlimited and Bella Masonry, LLC, alter egos and Bella Furniture Solutions, Inc. and Henry Bellavigna, Lisa Bellavigna, Robert P. Bellavigna and Domenick Bellavigna, Individuals *and* International Union of Bricklayers and Allied Craftworkers, Local No. 3 and Laborers International Union, Local No. 785 and Northeast Regional Council of Carpenters. Cases 03–CA–073540, 03–CA–073549, 03–CA–074523, 03–CA–074531, and 03–CA–079606

May 3, 2016

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On November 25, 2014, Administrative Law Judge Raymond P. Green issued the attached supplemental decision. The Respondent and the General Counsel each filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs, the Board's underlying decision and the Board's first supplemental decision, and has decided to affirm the judge's rulings, findings, and conclusions except as modified below and to adopt the judge's recommended Order as modified and set forth in full below.[1] We grant the General Counsel's exception to the judge's inadvertent omission from his order of remedial backpay in the amount of $446.32 for employee Robert Freelove, which the Respondents have not opposed. Below, we address (1) the liability of individual Respondents Lisa and Robert Bellavigna; and (2) the liability of Respondents Domenick Bellavigna and his solely owned corporation, Bella Furniture Solutions, Inc. ("Bella Furniture").

1. The Liability of Lisa Bellavigna and Robert Bellavigna

We agree with the judge that it is appropriate to pierce Ace's corporate veil and hold Respondents Lisa Bellavigna (Lisa) and Robert Bellavigna (Robert) individually liable for Ace's remedial obligations.

The Respondents have not directly excepted to any of the judge's fact and credibility findings supporting his conclusion as to Lisa Bellavigna's liability as Ace's sole owner. They contend only that she was justified in removing more than $242,000 from Ace's bank accounts under New York State's Lien Law, Section 70 and Section 71, in order to satisfy the claims of Ace's subcontractors. We agree with the judge, for the reasons he gives, that the provisions of the New York statute do not permit Lisa to shield the funds from being recovered to satisfy the Respondent's liability.[2]

With respect to Robert Bellavigna, as the judge noted, the Board, with judicial support, has pierced the corporate veil of closely held corporations that are essentially owned and controlled by members of one family to reach nonowner family members who play an active role in the corporation's operation and in the underlying misconduct.[3] Both Ace and Bella Masonry were solely owned corporations, and Robert, though not an owner of either entity, played an active and even controlling role in the operation of both. As Ace's project coordinator and field

[1] On January 23, 2013, the Board adopted Administrative Law Judge Geoffrey Carter's underlying decision, JD–65–12, 2012 WL 6755106, to which no exceptions were filed. In that decision the Board found that Respondent Bella Masonry was jointly liable for the unfair labor practices of Respondent Ace Unlimited ("Ace") as its alter ego. The Board's decision was enforced by the United States Court of Appeals for the Second Circuit on March 26, 2013, Docket No. 13–585 (unreported).

In *Ace Unlimited*, 360 NLRB No. 32 (2014), the Board's first supplemental decision in this case, the Board granted the General Counsel partial summary judgment on some of the allegations in his compliance specification and determined the backpay period and the formulas for determining the remedial payments owed to and on behalf of Ace's employees. The Board remanded the case for further determination of (1) the specific amounts owed to each employee and to the Charging Party Unions' respective benefit funds, and (2) the allocation of liability among the Respondents. At the hearing on remand, the parties stipulated to the individual amounts owed (totaling about $11,309 in backpay and about $128,773 in benefit contributions). The Respondents also conceded that they had not mailed the required remedial notice to employees, as the Board had ordered. (Because the mailing requirement has already been enforced by the court, it remains operative.

[2] We therefore need not pass upon the judge's comments on Sec. 302(c) of the Labor Management Relations Act with respect to an employer's obligation to make contractually required payments, or the existence of any possible conflict between the Act and the New York Lien Law. However, to the extent that compliance with the New York statute would conflict with the Board's broad remedial authority under the Act, the Respondents' defense would be preempted here. See, e.g., *NLRB v. State of Illinois Dept. of Employment Security*, 988 F.2d 735, 739–740 (7th Cir. 1993).

We further note, as a factual matter, that Lisa made no showing that any of the funds she removed from Ace's accounts actually were used to pay subcontractors.

[3] See *Baker Electric*, 351 NLRB 515, 523–525 (2007); *SRC Painting,* 346 NLRB 707, 708–709 (2006), enfd. by consent judgment (7th Cir. June 14, 2007); *Bufco Corp.*, 323 NLRB 609, 627–629 (1997), enfd. 147 F.3d 964 (D.C. Cir. 1998). We do not rely, as did the judge, on *A.J. Mechanical*, 352 NLRB 874, 875–877 (2008), enfd. 321 Fed.Appx. 816 (11th Cir. 2009).

supervisor, he actively participated in Ace's unfair labor practices. In the same capacity, he participated in Lisa's efforts to escape Ace's related liability through misuse of the corporate form by helping to divert more than $74,000 of Ace's assets into his and Lisa's personal bank accounts.[4]

We accordingly adopt the judge's findings that both Lisa and Robert Bellavigna are jointly and severally liable for the remedial payments at issue.

2. The Liability of Domenick Bellavigna

We also agree with the judge that Respondent Domenick Bellavigna (Domenick), the son of Respondent Henry Bellavigna (Henry), is not jointly and severally liable under piercing-the-corporate-veil doctrine. For the reasons the judge stated, Domenick and his solely owned corporation, Respondent Bella Furniture Solutions, were too removed from the ownership and management of the other two corporate Respondents to support this equitable remedy.[5]

Unlike the judge, however, we find that Domenick and Bella Furniture are jointly liable for the amount of Bella Masonry's assets that Henry (Bella Masonry's sole owner) fraudulently conveyed to them.[6] From September 2011 to June or July 2012, Domenick provided two purported services for Bella Masonry: the design, hosting, and maintenance of Bella Masonry's website; and the production, stuffing, and mailing of a set of marketing brochures. Domenick sent Bella Masonry an invoice for these services dated "May 1, 2012," billing $15,000 for the website and $19,100 for the brochure packets, totaling $34,100 and payable to Bella Furniture.[7] It is unclear from the record, however, when this invoice was actually prepared or sent to Bella Masonry. Domenick testified that he sent it by email at "the end of June" 2012, but he did not produce the email confirming this alleged transmittal. Melissa Blanchard, Bella Masonry's office manager, testified that she did not receive the invoice until August 24, 2012. Moreover, Bella Masonry did not pay the invoice until August 28, 2012, a few days after Henry publicly announced that his company was going out of business. In any event, Bella Masonry paid the full $34,100 charged. As described below, this amount was grossly inflated.

With respect to Domenick's work on Bella Masonry's website, the judge found from the credited evidence that he "essentially copied and modestly redesigned for Bella Masonry the already existing website" used by Ace, with fewer graphics and less detail. Moreover, Vista Print, which actually hosted the website, charged $35 a month—or a maximum of $385 in total—for that service. Blanchard, who had previously designed and maintained Ace's website and paid Ace's monthly hosting bills and whom the judge found credible, agreed on the basis of her own experience that Domenick's charge of $15,000 for Bella Masonry's website was a "large number." Domenick admitted that his charge was "towards the high end," even though he admittedly had never done such work for another customer.[8] In addition, Domenick's invoice charged for a full year of maintenance and hosting of the Bella Masonry website, even though he kept it online for a period of only 10 or at most 11 months.

With respect to the brochures, Domenick had 250 produced in February 2012 by an English company, Eman Printing. Eman sent a bill of $720 to Bella Masonry, which Henry forwarded to Domenick. Domenick testified that Bella Masonry's initial order was for 600 brochures, but that this changed after he produced the first 250, "when you guys [the Region and/or the Unions] started going after them thinking that all this alter ego . . . stuff was going on. . . . because the second this all happened when they started going after Dad and everything just got put on hold."[9] As for the remaining brochures, Henry told Domenick "[t]o just hold off and just see what—you know." No additional brochures were produced. As noted, however, Domenick's "May 1, 2012" invoice charged for 600 brochures and Henry paid that charge in full.

Domenick's invoice also included charges totaling $5700 for printing additional solicitation materials, inserting them into the brochures, and mailing the brochures to Bella Masonry's prospective customers. However, the judge credited the testimony of Blanchard, who became Bella Masonry's office manager after Ace be-

[4] Robert's testimony failed to account for the source of any of the cash deposits he made in the course of that diversion.

[5] In light of the evidence discussed below, however, we do not adopt the judge's implicit finding that Domenick was only a "passive recipient" of corporate funds within the meaning of established law on piercing the corporate veil.

[6] There are no exceptions to the judge's findings that Bella Masonry's corporate veil as Ace's alter ego should also be pierced and that Henry is also jointly and severally liable for the remedial payments at issue.

[7] Although the invoice was in the name of Bella Furniture, Domenick admittedly performed all the services billed, which were entirely unrelated to his company's furniture leasing business.

The judge mistakenly characterized the invoice amount charged for the website as "$18,700"; the amount charged for the brochures as "$15,300"; and the total amount billed as "$34,000." These minor errors, however, are inconsequential.

[8] When asked to justify billing such a high amount during cross-examination, Domenick responded: "Didn't hurt to try," and "Henry didn't argue, didn't say anything about it."

[9] The Unions' first unfair labor practice charge alleging that Bella Masonry was Ace's alter ego was filed on February 1, 2012.

came inactive, that she herself printed out the insert materials, inserted them into the 250 brochures she received, and stuffed the brochures into mailing envelopes; and that Henry paid the postage and mailed the envelopes at the post office. In these respects, the judge found, Domenick's charge for the brochures included "services that were not performed and . . . the purchase of brochures that were not delivered." The documentary evidence also strongly suggests that Eman did some and possibly all of the brochure design.

Given those circumstances, the General Counsel contends that Domenick's charges of $15,000 for the website and $19,100 for the brochures were grossly inflated, and that to this extent Henry and Domenick fraudulently transferred Bella Masonry's assets to Domenick and Bella Furniture in order to evade Henry's and Bella Masonry's alter ego liability in the underlying case. The judge, however, refused to find the website charge unreasonable because he had "no way of knowing" whether it was appropriate, due to the lack of expert testimony on that issue. To establish a reasonable price for the brochures, he reduced the invoice's combined charges for printing, stuffing, and mailing them by half—i.e., from $15,300 to $7650. He declined, however, to find Domenick liable for the discredited amount, believing that the doctrine of fraudulent conveyance is not recognized in Board law.

Contrary to the judge, the Board has applied fraudulent conveyance doctrine, holding that "the General Counsel may, without proving alter ego status, seek to impose limited liability on corporate officers or shareholders to the extent of specific corporate assets wrongfully distributed to them in avoidance of backpay liability."[10] We see no reason to limit the application of this doctrine to corporate officers or shareholders. Thus, where a family member participates in a fraudulent conveyance by improperly receiving assets of a family-owned corporate respondent from the relative controlling the corporation, the Board may recover those assets under either an "actual fraud" or "constructive fraud" theory. "Actual fraud" applies where it is alleged that the transferor intended to hinder, delay, or defraud creditors. In contrast, "constructive fraud" applies where the party challenging the transfer asserts that the transferee did not provide fair consideration for the exchange.

Here, the General Counsel made clear throughout the proceeding that Henry transferred assets to Domenick in order to shield the assets from attachment, i.e. the "actual fraud" theory of fraudulent conveyances. Under this theory, the General Counsel has the initial burden of showing that a transfer is voidable because the transferor acted with fraudulent intent in conveying assets to the transferee. If the General Counsel meets this burden, the burden shifts to the transferee to show that he acted in good faith and provided reasonably equivalent value in exchange for the transfer. Applying this standard, we find that Henry and Domenick's actions clearly establish that most of their website and brochure transactions were fraudulent conveyances of Bella Masonry assets.[11]

The General Counsel met his initial burden of showing that Henry acted with fraudulent intent. As the judge found, with ample record support, Henry's financial transactions during the relevant time frame—along with transactions made by Robert and Lisa Bellavigna—"were undertaken with a motive to evade legal obligations to their employees." Henry's acceptance of funds from Bella Masonry's bank accounts, along with his complete

[10] *Las Villas Produce*, 279 NLRB 883, 883 (1986). See also *Marsco, Inc.*, 287 NLRB 923, 927 (1987), enf. denied on other grounds 873 F.2d 884 (6th Cir. 1989); *F & W Oldsmobile*, 272 NLRB 1150, 1151 (1984) (applying fraudulent transfer theory although using veil-piercing terminology); *SRC Painting,* 346 NLRB at 709 fn. 12 (Member Liebman noting this authority).

The Board's approach in this area is consistent with the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act and the Uniform Fraudulent Conveyance Act), promulgated in 2014 by the Uniform Law Commission, as well as Federal and New York law. The Federal Debt Collection Procedure Act ("FDCPA"), 28 U.S.C. §§ 3304, 3301(5), authorizes the recovery of assets fraudulently transferred to avoid payment of debts to the United States and in part identifies various indicia of "actual intent to hinder, delay, or defraud a creditor." See *United States v. Schippers*, 982 F.Supp.2d 948, 964–967 (S.D. Iowa 2013) (explaining the elements of fraudulent transfer and the related "badges of fraud" under the FDCPA). New York State's Debtor and Creditor Law similarly recognizes fraudulent conveyance and the same analytical framework. See *Wall St. Associates v. Brodsky*, 257 A.D.2d 526, 528–530 (N.Y. App. Div. 1999).

[11] Contrary to the dissent, Domenick was not denied due process by application of the actual fraud analysis. On the contrary, throughout this proceeding the General Counsel made abundantly clear his allegation that the Respondents fraudulently conveyed payments to Domenick in order to render the Respondents judgment proof. Beginning with compliance specification (GC Exh. 1(d), 6–7), the General Counsel alleged that "Henry . . . in concert with Bella Furniture and Domenick . . . has diverted the assets of Respondent Bella Masonry in an effort to render Respondent Bella Masonry insolvent and make it incapable of fulfilling its obligations." The judge similarly articulated this theory during his prehearing ruling on the Respondents' motion to quash subpoenas: "In essence, the allegations . . . are that . . . the [principals] of Ace/Bella Masonry, made a "fraudulent conveyance" to a relative in order to shelter a large sum of money for which they might be liable . . . in the litigation." (ALJ Exh. 1(b) at 3). Indeed, the judge reiterated the actual fraud theory when directing the Respondents to provide documents responsive to this allegation. ("Since there is an issue regarding the relationship between Bella Masonry and Bella Furniture particularly as to whether there were any transfers of assets made to avoid the former's legal liabilities, I think that these documents might contain relevant information.") Id. at 4–5. Further, the General Counsel articulated this theory at the beginning of the hearing and continued to pursue it during the litigation. Accordingly, we disagree with the dissent that the General Counsel did not raise the actual fraud theory until his brief in support of exceptions.

failure to account for additional amounts belonging to the company, confirm that he removed corporate assets in order to make them unavailable to satisfy the Board's remedial order.[12] This course of conduct was entirely consistent with his paying the full charge of $9600 stated on Domenick's invoice for printing 600 brochures even though Henry was well aware (from having first received Eman's bill) that Domenick had only 250 printed and that the actual cost for those brochures was only $720.

The record likewise establishes that Domenick failed to meet his rebuttal burden.[13] First, there is ample evidence of Domenick's improper motive and lack of good faith. On whatever date he prepared and sent Bella Masonry his "May 1, 2012" invoice of $34,100, he admittedly knew that the General Counsel and the Unions were asserting alter ego claims against the other Respondents, including Henry. Apart from the obvious overcharges in that invoice, the judge found that Domenick altogether fabricated the charges for printing 350 brochures and additional solicitation materials; producing and stuffing the additional materials; and mailing the brochures. Domenick admitted that Eman's $720 charge covered the printing work—for which his invoice to Bella Masonry charged $9600. We note further that Domenick, within a week after depositing Bella Masonry's check for $34,100 in Bella Furniture's account, made 3 cash withdrawals from that account totaling $34,300.[14]

Domenick also failed to show that he provided reasonably equivalent value for most of the money that he received from Henry. He did not establish that his legitimate charge for brochure design exceeded $720: Eman's actual charge for producing 250 brochures.[15] And although the judge was correct that no expert testified to the actual value of Domenick's website design, we find on the basis of Blanchard's credited testimony and Domenick's own admissions that he was entitled to reimbursement of, at most, $385 in the form of the $35-per-month hosting cost charged by Vista Print, the host he used, over the maximum period of 11 months the website was shown to be in place. Apart from these valid $720 and $385 charges, Domenick failed to explain in detail what services he actually performed or otherwise justify his grossly inflated billings.

Thus, subtracting Domenick's valid $720 and $385 charges for brochure-printing and website-hosting, we find that $32,995 of the total $34,100 amount that Henry Bellavigna and Bella Masonry paid to Bella Furniture and to Domenick for his purported services was fraudulently conveyed and recoverable by the Board for the satisfaction of the other Respondents' liability for backpay and benefit contributions under the Act.

ORDER

The National Labor Relations Board orders that Respondent Ace Masonry, Inc., d/b/a Ace Unlimited, Ithaca, New York, and Respondent Bella Masonry, LLC, Burdette, New York, a single employer and alter egos, and Respondents Lisa Bellavigna, Robert Bellavigna, and Henry Bellavigna, individuals, their officers, agents, successors, and assigns, shall jointly and severally make whole the unit employees named below, and that Respondents Domenick Bellavigna and Bella Furniture Solutions, Inc., Greenville, Florida, shall make whole the unit employees named below up to the amount of $32,995, by paying them the amounts following their names,[16] with interest as computed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010), and minus tax withholdings required by Federal and State laws.

Robert A. Bellavigna	$ 308.84
Jason R. Dempsey	1,407.00

[12] The judge found that Bella Masonry received more than $126,000 of Ace's funds transferred by Lisa. In turn, from December 2011 to November 2012, while the underlying case was litigated to hearing, Henry pocketed more than $150,000 of Bella Masonry's cash assets. At the compliance hearing he also failed to account for another $45,000 of missing Bella Masonry assets.

[13] Contrary to the dissent, we find that Domenick was not prejudiced by the application of the actual fraud theory of fraudulent conveyance and the theory's burden that he show—after fraudulent intent was established—that he acted in good faith and provided reasonably equivalent value for the web and brochure design work. During the more than 4 hours that Domenick testified at the hearing, Domenick was extensively questioned about whether his charges for this work were inflated and whether he could substantiate them. The Respondents' attorney also introduced into evidence all of the documents Domenick testified he possessed relating to the work.

[14] Domenick testified that he used this cash to pay "personal" and "company" bills, but provided no documentary evidence of this. The judge, apparently not recognizing that how Domenick disposed of this cash was potentially relevant to the issue of his collusion with Henry, prevented the General Counsel from pursuing this matter further.

[15] Most of our disagreement with our dissenting colleague on the issue of "reasonably equivalent value" is not about what the evidence shows, but about whom should be held accountable for the lack of evidence-the General Counsel or Domenick. We disagree with our colleague's claim that Eman's generic statement to Domenick that "we have made [a] custom layout of your design" conclusively establishes that Domenick designed the brochure himself. In our view, it certainly does not override the lack of reliable evidence of how much time Domenick spent on brochure-related work or to what extent he was responsible for the content and design of the brochures—facts squarely within Domenick's control.

[16] The amounts following the employees' names do not include any amounts the Respondents may owe pursuant to *Kraft Plumbing & Heating, Inc*., 252 NLRB 891 (1980), affd. 661 F.2d 940 (9th Cir. 1981).

Joshua R. Freelove	1,824.08
David R. Howard	2,101.72
Brandon Marvin	288.00
Douglas F. Myles	635.39
Charles Morrow	4,297.76
Robert Freelove	446.32
TOTAL BACKPAY	$11,309.11

IT IS FURTHER ORDERED that Respondents Ace Masonry, Inc., Bella Masonry, LLC, Lisa Bellavigna, Robert Bellavigna, and Henry Bellavigna shall jointly and severally remit, and Respondents Domenick Bellavigna and Bella Furniture Solutions, Inc., shall remit up to the limit of $32,995, to the following union trust funds the contributions that the Respondents failed to make in the amounts set forth below, plus any additional amounts as prescribed in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Bricklayers Local No. 3 Funds	$ 60,026.26
Bricklayers International Funds	11,949.79
Laborers Local 7	2,475.48
Laborers Local 1358	5,171.56
Laborers Local 589	596.80
Northeast Dist. Council of Carpenters	48,553.16
TOTAL UNION TRUST FUND PAYMENTS	$128,773.05
COMBINED TOTAL DUE:	$140,082.16

Dated, Washington, D.C. May 3, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I agree with my colleagues in all respects, except with regard to the amount of liability to be assigned Domenick Bellavigna and Bella Furniture Solutions, Inc. (collectively "Domenick") and the manner in which that amount should be determined. I agree that it is appropriate to apply fraudulent conveyance doctrine to recover a portion of the $34,100 transferred to Domenick from Bella Masonry. However, for reasons explained below, I believe my colleagues impermissibly infringe on Domenick's due process rights by applying a theory of "actual fraud," under which the burden of proof is placed on Domenick to establish that he provided reasonably equivalent value in exchange for monies received. To avoid this infringement on Domenick's due process rights, I believe the General Counsel must bear the burden of proof to establish the extent to which Domenick did *not* provide fair consideration.

The transferor was a resident of New York,[1] so it is proper to apply New York fraudulent conveyance law. Specifically, I would apply New York Debtor and Creditor Law Section 273, which covers constructive fraudulent conveyance, see *United States v. McCombs*, 30 F.3d 310, 323 (2d Cir. 1994), under which the burden of proving lack of fair consideration rests on the party challenging the conveyance, id. at 324—here, the General Counsel.[2]

Turning first to Domenick's website-design, -hosting and -maintenance services, I agree with the judge that the record furnishes no basis for determining whether the $15,000 Domenick charged for those services was excessive. Absent evidence of the fair-market value of those services, which is needed to determine whether this figure was inflated and by how much, I believe the General Counsel has failed to satisfy his burden to prove that Domenick did not furnish fair consideration in exchange for the $15,000 he received.

I believe the record does support a finding that the $19,100 Domenick charged for creating, printing, and mailing 600 brochures represents an inflated figure: only 250 brochures were delivered, and Domenick included in that $19,100 figure charges for services rendered by Bella Masonry's office manager and stamps purchased by Henry Bellavigna himself. Contrary to my colleagues, however, the record does not support a finding that the

[1] Bella Masonry, LLC, was based in Burdette, New York.

[2] "There is some authority under New York law . . . for the view that where the evidentiary facts *as to the nature and value of the consideration* are within the transferee's control, the burden of coming forward with evidence on the fairness of the consideration shifts to the transferee." Id. (internal quotations omitted; emphasis in original). Here, however, the facts relating to the value of the services Domenick furnished in exchange for monies received from Henry Bellavigna were not within Henry's exclusive control but instead could have been established through testimony regarding the fair-market value of those services. Indeed, as explained below, the General Counsel *did* introduce testimony that Domenick did not perform all the brochure-related services for which he was paid. Accordingly, I believe the burden to prove lack of fair consideration properly remains with the General Counsel.

fair market value of Domenick's brochure-related services was $720, the amount charged by Eman Printing. The majority effectively concedes as much when finding that the documentary evidence "*suggests*" that Eman Printing did some and "*possibly* all" of the brochure design (emphasis added). In other words, the record evidence is inconclusive and thus fails to establish that Domenick charged for brochure-design work he did not perform. Moreover, contrary to my colleagues, the record evidence does not support a finding that Eman Printing designed the brochure. Rather, the evidence shows that Domenick designed the brochure himself and uploaded it into Eman Printing's system. Indeed, an email from Eman to Domenick states, "We have made [a] custom layout of *your* design" (emphasis added). Again, as with the website-design services Domenick performed, the facts relating to the value of his brochure-design services were not within Henry's exclusive control but instead could have been established through testimony regarding the fair-market value of those services. Therefore, because the record is inconclusive, I believe we must resolve this issue against the General Counsel, who is the party on whom the burden of proof rests. See *McCombs*, supra. I would adopt as a reasonable approximation the judge's finding that the fair market value of Domenick's brochure-related services was roughly 50 percent of the amount he charged and received. Accordingly, I would limit the amount of Domenick's liability to 50 percent of $19,100, or $9550.

My colleagues take issue with my application of a theory of constructive fraudulent conveyance and my assignment of the burden of proof to the General Counsel. They apply a theory of actual fraud under the Uniform Voidable Transactions Act (UVTA). Under the UVTA, once a creditor—here, the General Counsel, on behalf of the backpay claimants and union trust funds—has shown that a transfer was made "with actual intent to hinder, delay, or defraud any creditor of the debtor," UVTA § 4(a)(1), the transfer is voidable "to the extent necessary to satisfy the creditor's claim," id. § 7(a)(1), unless the transferee shows that he took the sum transferred "in good faith and for a reasonably equivalent value given the debtor," id. §§ 8(a), 8(g)(1) ("A party that seeks to invoke subsection (a) . . . has the burden of proving the applicability of that subsection."). Thus, assuming the General Counsel met his initial burden to show that the payments to Domenick were made "with actual intent to hinder, delay, or defraud," then under the UVTA my colleagues would be correct that on a theory of actual fraud, the burden of proof would shift to Domenick to show that he took payment of the $34,100 "in good faith and for a reasonably equivalent value" provided to Bella Masonry in exchange.

The problem with my colleagues' approach is, again, the impermissible infringement on Domenick's due process rights. The General Counsel did not litigate the issue of Domenick's liability under a theory of fraudulent conveyance. In both his opening statement at the hearing and his posthearing brief to the judge, the General Counsel's attorney argued that Domenick should be held personally liable under *White Oak Coal Co.*, 318 NLRB 732 (1995), which sets forth the standard to be applied in determining whether the corporate veil may be pierced.[3] This was the *sole* theory the General Counsel advanced. Nothing in the way the General Counsel litigated this case put Domenick on notice that the General Counsel was seeking, in the alternative, to recoup the $34,100 under the fraudulent conveyance theory of "actual fraud" on which my colleagues rely.[4] Thus, Domenick was not reasonably placed on notice that a burden of proof had shifted to him to establish that he took payment of the $34,100 "in good faith and for a reasonably equivalent value" of services rendered in exchange.[5] Accordingly,

[3] See Tr. 12 ("Regarding personal liability, this case falls under the *White Oak Coal* test."); General Counsel's Brief to the Administrative Law Judge, at 20 ("The evidence and applicable case law establish that it is appropriate in this case to pierce the corporate veil and hold the Bellavignas and Bella Furniture each derivatively liable. . . ."); id. at 24–25 (analyzing transfer of $34,100 to Domenick under the first prong of the *White Oak Coal* standard); id. at 27 (analyzing transfer of $34,100 to Domenick under the second prong of the *White Oak Coal* standard). The General Counsel did additionally argue that Henry Bellavigna fraudulently transferred his own personal assets to Domenick, but this involved the transfer of four real properties for $1 each, not the payment by Bella Masonry of the $34,100 for website- and brochure-related services. See Tr. at 13; GC's Brief to the ALJ at 25.

[4] The first and only time the General Counsel mentioned fraudulent transfer as an alternative basis of recovery from Domenick was in his exceptions brief (see General Counsel's Brief in Support of Exceptions, at 12)—after the judge mentioned this option in his decision but rejected it as not reflecting "the current state of Board law" (Judge's Decision at 13).

[5] Transfer of corporate assets without fair consideration is a relevant factor under prong one of the *White Oak Coal* standard. See 318 NLRB at 735. However, "the party asserting that the corporate veil should be pierced . . . has the burden of proof, and that burden is a heavy one." *Flat Dog Productions, Inc.*, 347 NLRB 1180, 1182 (2006). This further supports the conclusion that the General Counsel had the burden to prove lack of fair consideration, and Domenick had no reasonable notice that he must prove adequate consideration. Moreover, even assuming Domenick could have guessed that the Board would apply fraudulent conveyance law, he would have reasonably believed that New York law would apply (since the transfers came from Bella Masonry, located in New York), and under New York law, fair consideration is not a defense once intent to defraud is established. See *McCombs*, 30 F.3d at 328 ("Indeed, where actual intent to defraud creditors is proven, the conveyance will be set aside regardless of the adequacy of consideration given.").

as a matter of due process, my colleagues cannot properly hold Domenick liable to the extent *he* failed to prove fair consideration.

As a final matter, I am not contending that the Board is precluded from relying on the law of fraudulent conveyance. It would be manifestly unjust to permit Domenick to retain, at the expense of the backpay claimants and union trust funds, the part of the $34,100 as to which the General Counsel established that Domenick furnished nothing in exchange—e.g., brochures charged for that were never printed and delivered, postage charged for that was purchased by someone else. But to avoid impermissibly infringing on Domenick's due process rights, it is necessary to place the burden of proof on the correct party. Here, the General Counsel had the burden to show that fair consideration was *not* furnished, and Domenick did not bear the burden to prove that fair consideration *was* furnished. Accordingly, I believe it is appropriate to apply a theory of constructive fraudulent conveyance, under which, as I explain above, the burden of proof rests on the General Counsel.

Accordingly, for the above reasons as to these issues, I respectfully dissent.

Dated, Washington, D.C. May 3, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

Greg Lehmann, Esq., for the General Counsel.
Robert L. Boreanaz, Esq., counsel for the Charging Parties.
Jason B. Bailey, Esq., counsel for the Respondents.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Syracuse, New York, on various days in May, July, and August 2014.

This is a case arising out of a Backpay Specification that was issued on July 18, 2013. The underlying case was decided by an ALJ on December 12, 2012, and was upheld by the Board. The Board's Decision and Order was then enforced by the United States Court of Appeals for the Second Circuit on March 26, 2013.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

In the original case it was held that a company called Bella Masonry, LLC was the alter ego of Ace Masonry Inc., d/b/a Ace Unlimited and that both violated Section 8(a)(5) and (1) of the Act when they refused to abide by three collective agreements with the unions named above. These Respondents were ordered to make the employees covered by the respective labor contracts whole for any differences in their pay resulting from the failure of the Respondents to apply the terms of the respective contracts to them. Also, the Respondents were ordered to make whole certain of the unions' benefit funds where the Respondents had defaulted on their contractual obligations.

The Specification, as amended at the hearing, alleged that for the period from September 21, 2011, until the cessation of business by Bella, (Ace having ceased doing business on or about December 31, 2011). There is no dispute regarding the amounts of money owed as the parties entered into a stipulation at the hearing. Thus, the amount owed to the Carpenters' Funds, exclusive of interest and liquidated damages, is $48,553.16. The amount owed to the Bricklayers' Local 3 Funds, exclusive of interest and liquidated damages, is $60,026.26. The amount owed to the Bricklayers' International Funds, exclusive of interest and liquidated damages, is $11,949.79. The amount owed to the Laborers' International Funds, exclusive of interest and liquidated damages, is $8,242.84. Finally, the amount due individual employees is $11,309.11.

It is alleged and conceded that the Respondents Ace Masonry and Bella Masonry did not comply with the Board's requirement that the Notice be mailed to employees. It further was alleged and conceded that the Respondents failed to provide certain information to the Bricklayers and the Laborer's Unions; such information being ordered to be produced by the Board's enforced Order.

Therefore, the only issue remaining in this case is whether certain individuals connected to these corporate entities should be held to be derivatively and personally liable for the amounts set forth above. It is alleged that Henry Bellavigna, Lisa Bellavigna, and Robert P. Bellavigna should be individually liable because, among other things, they commingled their own personal assets with the respective corporate entities and transferred funds to and from these corporations to either themselves or to their family members in order to evade liability. It also is alleged that another family member, Domenick Bellavigna, is liable for an amount of money that he received for services that he rendered to Bella Masonry at a rate greatly in excess of market value. In this respect, the General Counsel contends that this was just another way of transferring corporate funds to a family member in order to evade Respondents' legal responsibilities to make contractually owed payments owed to employees via union benefit funds. As to Domenick Bellavigna, the General Counsel is contending that any liability incurred by him should be capped at the value of certain parcels of land transferred to him by Henry Bellavigna plus the amount of

[1] The first charge was filed on February 1, 2012. Thereafter, charges were filed on February 15, April 26, 27, and 30, 2012. A compliant was issued on April 31, 2012, and an amended consolidated complaint was issued on June 27, 2012. The cases were heard by Judge Carter from July 30 to September 13, 2012, and he issued his decision on December 12, 2012. The Board issued its Order on January 23, 2013, and the United States Court of Appeals for the Second Circuit issued a judgment enforcing the Board's Order on March 26 2013.

money that he received for the services he purportedly provided for Bella Masonry.

In the underlying unfair labor practice case, the following facts were established and are not subject to relitigation.

Lisa Bellavigna was the founder and owner of Ace Masonry, Inc. The name of that company was changed in 2006 to Ace Masonry, Inc., d/b/a Ace Unlimited.[2] Robert Bellavigna is her husband and was employed by Ace as its project coordinator and field supervisor. Henry Bellavigna is Lisa's father-in-law, who in 2004, was hired by Ace to be its chief estimator and senior project manager.

On September 21, 2011, Henry Bellavigna, while still employed by Ace Masonry, established his own company called Bella Masonry.

In October 2011, about six to eight employees of Ace Masonry were invited by Henry and Robert Bellavigna to join Bella Masonry as employees. When Bella Masonry became operational, Henry Bellavigna was the owner and Robert Bellavigna became the field supervisor. As in the case of Ace, Robert Bellavigna, had no ownership interest in Bella Masonry.

At the end of December 2011, all of the employees left Ace Masonry and certain equipment and tools owned by Ace were foreclosed by Tompkins Bank that had lent money to that company.[3]

On January 9, 2012, Bella Masonry purchased from the bank a truck that had been repossessed from Ace Masonry and in March 2012, Bella purchased from the bank some of the tools and equipment that the bank had repossessed from Ace.

In the present, case, the evidence shows that Bella Masonry, after it commenced operations and Ace Masonry ceased operating, did some work that had originally been obtained by Ace. In this way, as to this work, Bella acted essentially as a subcontractor for Ace.

The evidence shows that although Ace Masonry ceased its own operations by the end of December 2011, the corporation was not dissolved. Instead, it subcontracted out its existing contracts, mostly to Bella Masonry which, as noted above, was owned and operated by Lisa's father-in-law who, during 2012, employed her husband Robert and all or most of Ace's former construction employees. From what I can gather, there seems to be two projects that Ace Masonry had contracted for and which Bella Masonry continued to perform. These were construction projects for Episcopal Trinity Church and for Ithaca College.

As noted above, the first charge was filed in February 2012. That charge and all subsequent charges alleged that Ace Masonry and Bella Masonry were alter egos that had violated Section 8(a)(5) of the Act.

In addition to the unfair labor practice charges, the record shows that the Unions initiated State court actions to recover monies owed by Ace Masonry. Indeed, according to the testimony of Lisa Bellavigna, it seems that at some point, perhaps in the summer of 2012, one or more of the Unions obtained a restraining Order imposing certain restrictions on Ace from withdrawing or writing checks on its corporate account at Tompkins Bank.

At some point in 2012, Lisa Bellavigna, according to her own testimony, was told by a bank officer at Tompkins Bank that because the Carpenters Union was tying up Ace Masonry's account there, she would be well advised to close down the account and open up a new account somewhere else. According to her testimony, she agreed to this and expressed her intention of reopening her Tompkins account at some later date.

So, on August 6, 2012, Lisa Bellavigna opened, on behalf of Ace Masonry, an account at Citizens & Northern Bank with a deposit of $152,270.64. In this account, and over the next 14 days, she issued three checks in the amount of $90,000, $12,286.76 and $44,267. This account was then closed on August 20, 2012, with a withdrawal of $5,716.88. Based on her testimony, and in the absence of copies of the endorsed checks, it appears that a substantial amount of the deposited money was transferred to Bella Masonry. And as we have already seen, Bella Masonry was the alter ego of Ace Masonry. (In effect a payment from one entity to itself under a different name).

On October 11, 2011, Lisa Bellavigna on behalf of Ace Masonry, opened an account at Chemung Canal Trust Co. with an initial deposit of $2,093.67. This became an active and ongoing account for Ace and it was never actually closed. There were a number of transactions made at this bank that will be discussed later.

On October 22, 2012, Lisa Bellavigna opened, on behalf of Ace, an account at Community Bank. The initial deposit was in the amount of $18,290.95 derived from a check received by a customer of Ace. Discussed below will be a number of transactions at this bank.

Based on her testimony it is obvious to me that Lisa Bellavigna closed out Ace Masonry's corporate bank account at Tompkins Bank and opened up new Ace Masonry accounts at these various banks so as to evade making payments that Ace had contracted for with the unions that are the charging parties in this case.

The Respondents contend that Ace Masonry was justified, indeed obligated, to avoid making payments to the Unions and instead obligated to make payments to its subcontractors. In this respect, New York State Lien Law, Section 701 is cited.[4]

As I understand the State law, it is designed to insure that a vendor, subcontractor, architect, engineer, surveyor, laborer or materialman will get paid for work done or expenditures made arising out of the improvement of real property and incurred in the performance of his or her contract or subcontract. In effect, the law sets up a constructive trust wherein the general contractor is deemed to be the trustee with a fiduciary obligation to

[2] Although Ace Masonry was originally owned by Lisa Bellavigna and Dave Tavner, the latter had sold his shares to Lisa Bellavigna by the time of the events that led to these cases. It should be noted that Dave Tavner and Lisa's husband, Robert Bellavigna, were the co-owners, via a company called BT of Ithaca, of the property from which Ace did business and to which Ace paid rent. She testified that at some point, Tompkins Bank foreclosed on that property.

[3] According to Lisa Bellavigna, she had a line of credit with Tompkins Bank which was in arrears and which resulted in that bank foreclosing on Ace Masonry's equipment and vehicles, among which were forklifts, trucks, tools etc.

[4] A copy of this statute is appended to the Respondents' brief and I will take official notice of it.

these categories of persons.

Given this state law, the Respondents argue that the unions would not be within the favored class of creditors and therefore Ace Masonry's payments to its contractors was justified. I disagree.

For one thing, the state law, at Section 71(2)(d), treats payments of any benefits or wage supplements owed by a contractor to its employees with the same level of priority as the persons described above. Therefore, the monies that Ace Masonry owed to the Union Benefit funds, which had accrued from before 2012, were monies owed to its own employees in the form of health and pension benefits receivable by its employees, via the union funds, as part of their compensation for having performed services for Ace.

For another thing, a large portion of the payments that Ace Masonry made during this period of time, were made to Bella Masonry, which was held to be the alter ego of Ace. Thus, any payments by Ace Masonry to Bella Masonry were essentially payments to itself and not a genuine arms-length transaction between one independent contractor and another.

Finally, since the legal obligation of an employer subject to the jurisdiction of the National Labor Relations Act is to make contractually required payments to union trust funds where there is a lawful collective bargaining relationship, is one that is embodied in Section 8(a)(5) and 8(d) of the Act. Moreover, such payments are also protected by Section 302(c) of the Act. Therefore, to the extent that State law might conceivably conflict with the Federal law, then the latter must prevail under the Supremacy clause of the Constitution. (In fact, I do not see any conflict).

As noted above, Henry Bellavigna, who previously had been an employee of Ace Masonry, (and Lisa's father-in-law), opened up Bella Masonry in September 2011. And when Ace Masonry ceased being a functioning contractor, Bella took over Ace's employees and customers. That is, these same employees, (including Robert Bellavigna), continued to do the work that had originally been contracted for with Ace Masonry. Also, the record shows that much of the equipment used by Bella Masonry was purchased by it from Tompkins Bank which as noted above, had foreclosed on all or most of the equipment previously owned by Ace Masonry. (Tools, forklifts, etc.)

The evidence is that Bella Masonry did contracting work until August 2012 when Henry Bellavigna decided to terminate its operations. In this regard, it is quite clear from his testimony that he chose to close his business because the unions were pursuing litigation that asserted that Bella Masonry was the alter ego of Ace Masonry and that it therefore was liable for Ace's contractual obligations to the unions and to the represented employees.

In the meantime, on September 30, 2011, Bella Masonry opened a corporate account with Chemung Canal Trust Company with an initial deposit of $2000. Described below will be a number of transactions made from this bank account.

During the course of the year, Henry Bellavigna contracted with his son Domenick to purportedly provide certain advertising and web site services for Bella Masonry. These services which will be described below, are alleged to have been bogus or grossly cost inflated.

Also, after Henry Bellavigna decided to terminate Bella Masonry's operations, he conducted a private sale of the company's property. And as to this transaction, the General Counsel and the Charging Parties contend that a substantial portion of the proceeds from this sale found their way into Henry Bellavigna's pocket and not into Bella's corporate account.

As noted above, Robert Bellavigna was employed as a supervisory employee by both Ace Masonry and Bella Masonry. Since these were both small companies, I will assume that much of their field work was conducted under his supervision. The record establishes that Robert Bellavigna was entitled to write checks on Ace's account and was allowed to utilize Ace's credit card. He personally guaranteed an obligation in relation to the purchase of Ace's stock by his wife from David Traver. Additionally, the record establishes that as husband and wife, Lisa and Robert Bellavigna, jointly owned real property and also jointly owned personal financial accounts into which sizeable sums money were deposited soon after withdrawals were made from Ace Masonry's corporate accounts.

It is now time to do some accounting and look at bank records.

Accounts of Ace Masonry and accounts of Lisa and Robert Bellavigna

As noted above, Ace Masonry, in 2011, maintained an account at Tompkins Bank. Lisa Bellavigna, on the advice of a bank employee, terminated that account, essentially to avoid making owed payments to the various union benefit funds. Thereafter, on August 6, 2012, October 11 and 22, 2012, she opened up, on behalf of Ace, accounts at Citizens & Northern Bank, Chemung Canal Trust Co., and Community Bank. As previously described, the Citizens & North Bank account was closed after 14 days. Subsequently, Lisa Bellavigna on behalf of Ace, opened another account at Chemung on or about June 11, 2014.

During this period of time and presumably to the present, Lisa Bellavigna and Robert Bellavigna, have maintained joint personal accounts at Tompkins Trust Company and Visions Federal Credit Union. Robert Bellavigna also had his own personal account at Community Bank. They also are the joint owners of their home and real property.

Bella Masonry maintained its corporate account at Chemung Canal Trust Company. Henry Bellavigna also maintained a separate personal account at this bank.

With respect to Ace's original account at Chemung, the record shows that over a period of time, Lisa Bellavigna made cash withdrawals in the following dollar amounts.

July 24, 2012	9800
August 4, 2012	700
January 7, 2013	1000
March 27, 2013	9970
March 28, 2013	9760
March 29, 2013	9760

Also with respect to Chemung, the record shows that after receiving a check for $46,500 from Ithaca College, Ace Masonry opened a new account at this bank on June 11, 2014. Immediately thereafter, Lisa Bellavigna made the following cash

withdrawals from that account.

June 12, 2014	9300
June 13, 201	9300
June 16, 2014	9300
June 17, 2014	9300
June 18, 2014	9300

With respect to the Ace Masonry's account at Citizens & Northern Bank, which was opened on August 6 and closed on August 20, 2012, the record shows that Lisa closed this account by making cash withdrawal of $5,716.88.

Turning to Ace Masonry's account at Community Bank, the record shows that Lisa Bellavigna issued checks made out to cash or withdrew cash in the amounts and dates as follows:

October 23, 2012	9000
October 25, 2012	8600
October 31, 2012	6000

With respect to all of these withdrawals, totaling $70,526.88, either of cash or checks made out to cash, Lisa Bellavigna could not or more likely would not remember what happened to the money, where it went, or what it was used for.

During the period between July 2012 and March 2013, cash deposits totaling $47,750 were made into the joint account of Lisa and Robert Bellavigna at Visions Federal Credit Union. These were as follows:

July 27, 2012	9600
August 31, 2012	2000
August 31, 2012	300
September 25, 2012	1300
October 3, 2012	2000
October 15, 2012	1050
October 22, 2012	800
October 31, 2012	4500
December 4, 2012	6000
December 12, 2012	500
December 13, 2012	700
December 21, 2012	2600
January 3, 2013	1000
January 5, 2013	800
January 29, 2013	2000
February 7, 2013	1000
February 16, 2013	2000
March 6, 2013	1700
March 27, 2013	7900

During the period from October 2012 and March 2013, cash deposits totaling $10,400 were made into the joint account of Lisa and Robert Bellavigna at Tompkins Trust Company.

During the period from August 6, 2012, to January 24, 2013, Robert Bellavigna made three cash deposits totaling $13,000 to his account at Community Bank.

Accounts of Bella Masonry and Henry Bellavigna

A review of the bank records for Bella Masonry show the following transactions, most of which were made at the time of, or soon after he announced the closing of the company. The records show the following dollar amount transactions:

12/23/11	10367 check signed by Henry Bellavigna, payable to himself.
3/27/12	17200 cash withdrawal made by Henry Bellavigna
8/3/12	2500 check signed by Henry Bellavigna, payable to himself.
8/9/12	4950.59 check signed by Henry Bellavigna, payable to himself.
8/10/12	4687.67 check signed by Henry Bellavigna, payable to himself.
8/13/12	4950.58 check signed by Henry Bellavigna, payable to cash.
8/14/12	8500 check signed by Henry Bellavigna, payable to cash.
8/15/12	8500 check signed by Henry Bellavigna, payable to cash.
8/17/12	8500 check signed by Henry Bellavigna, payable to cash.
10/2/12	601.75 check signed by Henry Bellavigna, payable to himself.
10/25/12	8000 check signed by Henry Bellavigna, payable to cash.
10/27/12	2577.08 check signed by Henry Bellavigna, payable to himself.
11/ 3/12	8000 check signed by Henry Bellavigna, payable to himself.
11/5/12	8000 check signed by Henry Bellavigna, payable to himself.
11/6/12	8000 check signed by Henry Bellavigna, payable to himself. [5]

As in the case of Lisa Bellavigna, Henry Bellavigna could or more likely would not remember what happened to the money taken out of the Bella Masonry account, where it went to or what it was used for.

As noted above, Henry Bellavigna announced the termination of Bella Masonry in August 2012. On August 17, 2012, he announced and thereafter held a private sale of Bella's equipment, most of which had originated from Ace Masonry. At this sale, Casler Masonry purchased items by checks payable to Henry Bellavigna. These were, respectively for $21,000 and $50,000. According to Henry Bellavigna's bank records, he deposited into his personal bank account, the $21,000 check plus $19,500 from the $50,000 check. The other $31,000 was deposited into Bella's account at Chemung Canal Trust. But the records from that bank show that a series of five cash withdrawals were made by Henry Bellavigna from September 10 to 14, 2012. Where this $40,000 went, he could offer no clue.

The sale also produced an additional $45,000. These proceeds were either paid in cash or by checks made out to and cashed by Henry Bellavigna. None of this money, as far as this record shows, went into Bella Masonry's bank account.

The cash withdrawals by Henry Bellavigna from Bella Masonry's bank account and his sale of the company's assets re-

[5] Of lesser significance, but still relevant, the record establishes that from September 2011 to about February 2013, Henry Bellavigna made deposits by cash or check from himself to Bella Masonry's account. Although characterizing these as loans, these were never documented.

sulted in all of this money eventually finding its way into Henry Bellavigna's pocket. Therefore, these transactions essentially left Bella Masonry without money to pay off its creditors, including the union pension and benefit funds.

Transactions involving Domenick Bellavigna

There is also the matter of a transaction between Henry Bellavigna, purportedly on behalf of Bella Masonry, with his son, Domenick.

Domenick Bellavigna operates a company under the title of Bella Furniture and/or Bella Furniture Solutions. This company, once incorporated, and since run as a single proprietorship, is located in Florida. At one time, Henry Bellavigna was listed as an officer of the company but it does not appear that he has ever had any ownership or managerial interest in his son's Florida business. (He did once manage to utilize his interest in this company in order to take a deduction in his personal tax return). In any event, the evidence shows that Domenick Bellavigna did not have any ownership interest in either Ace Masonry or Bella Masonry.

There is an invoice dated May 1, 2012, for services performed by Bella Furniture for Bella Masonry. This allegedly was for the production of advertising brochures and the design and maintenance of a company website. A check for $34,000 was sent from Bella Masonry to Bella Furniture on August 28, 2012, shortly after Henry Bellavigna announced that Bella Masonry was going out of business. The question here is whether this payment was for real services or for bogus services. Was it simply a means to transfer money out of Bella Masonry's account for relocation to a member of the family and to evade paying creditors?

The General Counsel contends that about $18,700 charged for the design and maintenance of the website, was a grossly inflated amount. He asserts that a charge of $150 per hour for website design is, in his opinion, too much especially since Domenick essentially copied and modestly redesigned for Bella Masonry, the already existing web site that had been used by Ace Masonry.

I simply have no way of knowing if the amount charged by Domenick Bellavigna was appropriate. The General Counsel could have, but apparently chose not to call a witness who either was an expert in these sorts of things or someone with experience who could have testified what he or she typically charges for these types of services. Given this absence of testimony, I cannot conclude that this service rendered by Domenick Bellavigna was completely unreasonable.

The General Counsel also contends that the charge of $15,300 for the creation, printing and shipping of brochures was also unreasonable. These brochures, one of which was produced at the hearing were, according to Respondent's witnesses, made by an English company called Eman Printing. The record indicates that Domenick Bellavigna charged for the creation of 600 brochures, but that only 250 were ever produced and delivered. The record also shows that Domenick charged for printing out and inserting certain advertising materials into the brochures and that he charged for the stamps and for the mailing out the brochures. However, the credited testimony of Melissa Blanchard, who worked as the officer manager of Bella Masonry, was that she printed out the materials to be placed into the brochures; that she stuffed them into the mailing envelopes; and that Henry paid for the stamps and delivered them to the post office.

In light of the above, I am going to conclude that the charge for the brochures was inflated by including services that were not performed and by including the purchase of brochures that were not delivered. I therefore am going to cut the charge in half in order to approximate what I think would be a reasonable price for the creation of these brochures. ($7,650).

Finally, the evidence shows that Henry Bellavigna transferred four parcels of real property to Domenick Bellavigna. These were located in Hector, New York and were transferred on August 1 and 6, 2012, for the sum of $1.00. The assessed valuations of these properties totaled $30,600, and as pointed out by the General Counsel, were made when Henry Bellavigna was on notice of the NLRB's claim against Bella Masonry because of the allegation that it was an alter ego of Ace Masonry. (The NLRB complaint was issued on June 27, 2012, and the hearing opened on July 30, 2012).

Analysis

The Board's treatment of whether or not individuals can be held personally liable for the backpay obligations incurred from the commission of unfair labor practices by a limited liability corporation has undergone some transition, discussion and debate over the years. In the present state of the law, the issue comes down to whether the Board can "pierce the corporate veil."

In *White Oak Coal Co.,* 318 NLRB 732 (1995), the Board reconsidered the standard that had previously been set forth in *Riley Aeronautics Corp*., 178 NLRB 494 (1969). The Board stated that it was reconsidering the standard for determining individual liability because if felt that the "multifaceted approach to imposing personal liability to be unclear and unwieldy." Instead, the Board adopted the 10th Circuit's two pronged approach enunciated in *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047 (10th Cir. 1993). The Board's decision further stated that it was reaffirming "that personal liability for remedial obligations arising from corporate unfair labor practices under the National Labor Relations Act is a question of federal law because it arises in the context of a Federal labor dispute." Citing *NLRB v. Fullerton Transfer & Storage*, 910 F.2d 331, 335 (6th Cir. 1990), and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). As to the new standard the Board stated:

> Under Federal Common law, the corporate veil may be pierced when: (1) there is such unity of interest and lack of respect given to the separate identify of the corporation by its shareholders that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations.
>
> When assessing the first prong to determine whether the shareholders and the corporation have failed to maintain their separate identities, we will consider generally (a) the degree to which the corporate legal formalities have been maintained,

> and (b) the degree to which individual and corporate funds, other assets and affairs have been commingled. Among the specific factors we will consider are: (1) whether the corporation is operated as a separate entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of [same] or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate legal formalities and the failure to maintained arm's length relationship among related entities; (8) diversion of the corporate funds or assets to non-corporate purposes; and in addition, (9) transfer or disposal of corporate assets without fair consideration.
>
> When assessing the second prong, we must determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from misuse of the corporate form. Further, the individuals charged personally with corporate liability must be found to have participated in the fraud, injustice, or inequity that is found.

In *Domsey Trading Corp.*, 357 NLRB 2161 (2011), a Board majority held that the first prong of the *White Oak* test could be met simply by showing that there was a substantial comingling of funds between the corporate entities and the individual owners. In that case there was a one-time transfer of virtually all of the corporate assets to the owners who thereafter deposited the money into their own personal accounts. The Board concluded that this transfer would cause an injustice or inequity to the employees inasmuch as the transfer of funds left the corporations without asserts and essentially made it judgment proof unless the corporate owners could be held personally liable. The Board therefore also concluded that the second test of *White Oak* had also been met. This decision was subsequently affirmed by the Second Circuit Court of Appeals, sub nom, *Estate of Arthur Salm, v. NLRB* (January 30, 2013). In discussing the application of the *White Oak* standard, the Court stated:

> While based on one major transaction, the Board rightly concluded that an analysis of these factors showed that Salm had indeed abused the corporate form to such a degree - by drawing down virtually all of the assets of the Domsey Trading Corporation for his personal use-that the first prong of the White Oak test has been met.
>
> The second prong of White Oak has also been met because it is clear that the abuse of the corporate form here would indeed promote injustice and allow for the evasion of legal obligations. By removing nearly all of the assets of the corporation, outside of the context of a legitimate winding down or dissolution, Salm made it likely that the corporation would be unable to meet its remedial obligations. Salm argues that because the three Domsey corporations, a single employer, were not shown to be insolvent, this prong has not been met. This is not the standard. Here, it is clear that his removal of these funds had the "natural, foreseeable, and inevitable consequence" of diminishing Domsey's ability to satisfy its remedial obligations.

In my opinion, the facts in the instant case show an equal or greater degree of commingling than was shown in the Domsey case. In the case of Ace Masonry, the evidence shows a continuous and substantial depletion of that company's corporate assets through diversion to both Lisa and Robert Bellavigna. In addition, the record shows that in August 2012, when Ace was on its way out of business, it transferred substantial funds to Bella Masonry, its alter ego.

By the same token the evidence shows substantial transfers of funds from Bella Masonry to its owner Henry Bellavigna. There is no question in my mind that his testimony regarding the whereabouts or use of these monies was disingenuous, and that the money simply went from Bella Masonry into his pocket. [6] In the case of the sale of Bella Masonry's equipment, most of that money did not even make it into the company's corporate bank account.

I also conclude that these transactions made by the owners of Ace Masonry and Bella Masonry were undertaken with a motive to evade legal obligations to their employees. This was explicitly admitted by Lisa Bellavigna and implicitly conceded by Henry Bellavigna.

Thus, as to Lisa Bellavigna and Henry Bellavigna, I conclude that the two prong test of *White Oak* has been met and that these corporate shareholders should be held personally liable.

As to Robert Bellavigna and Domenick Bellavigna, the issue is somewhat different. Inasmuch as neither was a shareholder of Ace Masonry or Bella Masonry, there is an issue as to whether, "piercing the corporate veil," would applicable to these individuals. In this respect, there are a number of Board decisions involving closely held corporations and transfers of corporate money and assets to non-owner family members. See *A.J. Mechanical Inc*., 352 NLRB 874, 875–877 (2008); *D.L. Baker Inc*., 351 NLRB 515, 523–525 (2007); *SRC Painting, LLC*., 346 NLRB 707 (2006); and *Bufco Corp*., 323 NLRB 609, 624–629 (1997).

In my opinion, the present state of the law is best described in *SRC Painting, LLC*., supra. In that case, the ALJ concluded that the three corporate respondents were alter egos of each other and that all of the family members associated with these companies were personally liable. The Board agreed that four of the family members were personally liable because "each actively participated in the operation of the corporate respondents, including the distribution of corporate assets for non-corporate purposes." However, the Board also concluded that two members of the family, Karen and Constance Wierzbicki, who were not shareholders, should not be held personally liable. As to these two, the Board held that they could not be held liable simply because they were the passive recipients of diverted corporate funds. The Board, with Liebman concurring, stated:

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[6] Indeed there was some evidence, not fully litigated, that during the course of this trial, Henry Bellavigna was transferring some of his own money to yet another person.

> As the Tenth Circuit explained in *NLRB v. Greater Kansas City Roofing*, whose analysis the Board explicitly adopted in White Oak: "[A] necessary element of the [piercing-the-corporate-veil] theory is that the fraud or inequity sought to be eliminated must be that of the party against whom the doctrine is invoked, and such party must have been an actor in the course of conduct constituting the abuse of corporate privilege." 2 F.3d at 1053 (quoting from 1 Fletcher, C*yclopedia of Corporations*§ 41.20, at 639 (1990)). For this reason, a person's passive receipt of benefits that derive from a diversion of corporate assets for non-corporate purposes does not, by itself, demonstrate participation in the fraud, injustice, or inequity sufficient to establish individual liability under the second prong of the *White Oak* analysis. See *Smith Barney, Inc. v. Strangie*, 192 F.3d 192 (1st Cir. 1999) (finding wife who may have personally benefited from husband's diversion of corporate assets for non-corporate purposes not individually liable); *Firstmark Capital Corp. v. Hempel Financial Corp*., 859 F.2d 92, 95 (9th Cir. 1988) (finding wife who personally benefited from husband's diversion of corporate assets for non-corporate purposes not individually liable). In other words, where the individual alleged to be liable plays no active role in the corporation's operations, that individual has not effectively become the business entity simply upon receipt of funds or other corporate assets, and accordingly cannot be held liable for the corporation's obligations. (Footnotes omitted).

In the present case, the evidence shows that Robert Bellavigna played an active role in the business affairs of both Ace Masonry and Bella Masonry. The evidence also demonstrates that he participated in the diversion of Ace's corporate funds to himself and to his wife. Accordingly, I conclude that he should be held to be individually liable.

I cannot come to the same conclusion with respect to Domenick Bellavigna. He is located 1500 plus miles away and operates his own business. He had no ownership interest in either Ace Masonry or Bella Masonry and was not involved in their business operations except to the extent that he may have performed a contracted service for Bella Masonry. Based on the record in this case, I cannot say that a substantial part of the services that he provided to Bella were either a complete sham or were grossly overcharged. Nor can I conclude that his receipt of the four parcels of property, originally owned by his deceased mother, was part of a plan, *in which he knowingly participated*, that was designed to divert assets so that the corporations could evade their legal obligations to the employees and the union benefit funds.

I do note that in *SRC Painting, LLC*, Board Member Liebman opined that in similar circumstances, where a person receives corporate assets without consideration, he or she could be held personally liable by applying a fraudulent transfer theory instead of a piercing the corporate veil theory. Nevertheless, she did not do so because that theory was not argued by the General Counsel in that case. I see nothing in the statute that would preclude the Board from adopting a "fraudulent transfer" theory for finding personal liability. Indeed, the adoption of such a theory might deter individual from engaging in financial shenanigans designed to evade liability incurred from violatons of the National Labor Relations Act. However, this is not, as far as I am aware, the current state of Board law.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER[8]

1. The Respondents, Ace Masonry, Inc., d/b/a Ace Unlimited, Bella Masonry, LLC, Lisa Bellavigna, Robert P. Bellavigna, Henry Bellavigna, their officers, agents and successors and assigns, shall make whole the employees named below by paying them the amounts following their names, with interest as computed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Robert A. Bellavigna	308.84
Jason R. Dempsey	1,407.00
Joshua R. Freelove	1,824.08
David R. Howard	2,101.72
Brandon Marvin	288.00
Douglas F. Myles	635.39
Charles Morrow	4,297.76

2. The Respondents shall additionally remit to the union trust funds the contributions that the Respondents failed to make in the amounts set forth below, plus any additional amounts as prescribed in *Kraft Plumbing & Heating, Inc*., 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), and *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn.7 (1979).

Bricklayers Local No. 3 Funds	60,026.26
Bricklayers International Funds	11,949.79
Laborers Local 7	2,475.48
Laborers Local 1358	5,171.56
Laborers Local 589	596.80
Northeast District Council of Carpenters	48,553.16

3. The Respondents shall mail, at their own expense, to the former employees of Ace Masonry and/or Bella Masonry, a copy of the Board's Notice that was appended to the Board's Decision dated January 23, 2013.

Dated: Washington, D.C. November 25, 2014

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[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] As to the finding that the Respondents failed to furnish certain information, that information was sought to determine if Bella Masonry was the "disguised continuance and alter ego of Ace." Since it has been concluded in these proceedings they were alter egos, the information is now moot.